In the Supreme Court

OF THE

United States

OCTOBER TERM, 1977

No. 77-1121

STATE COMPENSATION INSURANCE FUND,
Petitioner,

vs.

WORKERS' COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA; COUNTY OF LOS ANGELES, Legally Uninsured; and JENNIE R. BUSCH,
Respondents.

PETITION FOR A WRIT OF CERTIORARI to review a denial of Petitioner's Petition for a Hearing Before the Supreme Court of the State of California

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PETITION FOR A WRIT OF CERTIORARI

to review a denial of Petitioner's Petition for a Hearing Before the Supreme Court of the State of California

Petitioner, State Compensation Insurance Fund, prays that a Writ of Certiorari issue to review the order of the California Supreme Court entered on December 15, 1977 denying petitioner's Petition for a Writ of Review.

DENIAL OF PETITION

The Supreme Court of California denied petitioner's Petition for Hearing on December 15, 1977, following the Court of Appeal's denial of the Petition for a Writ of Review on November 15, 1977.

JURISDICTION

Jurisdiction of this Court is invoked, pursuant to 28 U.S.C. §1257 (3) and is based on the ground that the California Supreme Court, the highest Court of the State, in its order denying petitioner's Petition for a Writ of Review, has determined against the validity of the Federal right, privilege and immunity granted to petitioner under the Fourteenth Amendment of the Constitution of the United States and his right to equal protection under the law, and due process of law.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Fourteenth Amendment, Section 1

"SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution of the State of California, Article XX, Section 21

(Deering's California Codes, Art. XI-End, page 574)

"Section 21. [Workmen's compensation]. The Legislature is hereby expressly vested with plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of workmen's compensation, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any or all persons to compensate any or all of their workmen for injury or disability, and their dependents for death incurred or sustained by the said workmen in the course of their employment, irrespective of the fault of any party. A complete system of workmen's compensation includes adequate provisions for the comfort, health and safety and general welfare of any and all workmen and those dependent upon them for support to the extent of relieving from the consequences of any injury or death incurred or sustained by workmen in the course of their employment, irrespective of the fault of any party; also full provision for securing safety in places of employment; full provision for such medical, surgical, hospital and other remedial treatment as is requisite to cure and relieve from the effects of such injury; full provision for adequate insurance coverage against liability to pay or furnish compensation; full provision for regulating such insurance coverage in all its aspects, including the establishment and management of a State compensation insurance fund; full provision for otherwise securing the payment of compensation; and full provision for vesting power, authority and jurisdiction

in an administrative body with all the requisite governmental functions to determine any dispute or matter arising under such legislation, to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character; all of which matters are expressly declared to be the social public policy of this State, binding upon all departments of the State government.

"The Legislature is vested with plenary powers, to provide for the settlement of any disputes arising under such legislation by arbitration, or by an industrial accident commission, by the courts, or by either, any, or all of these agencies, either separately or in combination, and may fix and control the method and manner of trial of any such dispute, the rules of evidence and the manner of review of decisions rendered by the tribunal or tribunals designated by it; provided, that all decisions of any such tribunal shall be subject to review by the appellate courts of this State. The Legislature may combine in one statute all the provisions for a complete system of workmen's compensation, as herein defined.

"The Legislature shall have power to provide for the payment of an award to the state in the case of the death, arising out of and in the course of the employment, of an employee without dependents, and such awards may be used for the payment of extra compensation for subsequent injuries beyond the liability of a single employer, for awards to his employees.

"Nothing contained herein shall be taken or construed to impair or render ineffectual in any measure the creation and existence of the industrial accident commission of this State or the State compensation insurance fund, the creation and existence of which, with all the functions vested in them, are hereby ratified and confirmed."

Labor Code, State of California
(Deering's California Codes, Labor Code, §5300-End, page 72)

"§5500.5. Employer liability for occupational disease or cumulative injury: Apportionment

"(a) Except as otherwise provided in Section 5500.6, liability for occupational disease or cumulative injury shall be limited to those employers who employed the employee during a period of five years immediately preceding either the date of injury, as determined pursuant to Section 5412, or the last date on which the employee was employed in an occupation exposing him to the hazards of such occupational disease or cumulative injury, whichever occurs first. If, based upon all the evidence presented, the appeals board or referee finds the existence of cumulative injury or occupational disease, liability for such cumulative injury or occupational disease shall not be apportioned to prior years except as provided in subdivision (d); however, in determining such liability, evidence of disability due to specific injury, disability due to nonindustrial causes, or disability previously compensated for by way of a findings and award or order approving compromise and release,

or a voluntary payment of disability, may be admissible for purposes of apportionment."

* * * * * *

"(d) If the employment exposing the employee to the hazards of the claimed occupational disease or cumulative injury was for more than five years with the same employer, or its predecessors in interest, the limitation of liability to the last five years of employment as set forth in subdivision (a) shall be inapplicable. Liability in such circumstances shall extend to all insurers who insure the workers' compensation liability or such employer, during the entire period of the employee's exposure with such employer, or its predecessors in interest. The respective contributions of such insurers shall be in proportion to employment during their respective periods of coverage. As used in this subdivision, "insurer" includes an employer who during any period of the employee's exposure was self-insured or legally uninsured.

"The provisions of this subdivision shall expire on July 1, 1986, unless otherwise extended by the Legislature prior to that date.

"(e) At any time within one year after the appeals board has made an award for compensation benefits in connection with an occupational disease or cumulative injury, any employer held liable under such award may institute proceedings before the appeals board for the purpose of determining an apportionment of liability or right of contribution. Such a proceeding shall not diminish, restrict, or alter in

any way the recovery previously allowed the employee or his dependents, but shall be limited to a determination of the respective contribution rights, interests or liabilities of all the employers joined in the proceeding, either initially or supplementally; provided, however, if the appeals board finds on supplemental proceedings for the purpose of determining an apportionment of liability or of a right of contribution that an employer previously held liable in fact has no liability, it may dismiss such employer and amend its original award in such manner as may be required."

STATEMENT OF ISSUES

This is a petition for a writ of certiorari from a denial of a petition for writ of review by the Supreme Court of the State of California which refused to annul a Finding and Award of the Workers' Compensation Appeals Board. The Workers' Compensation Appeals Board awarded death benefits to the applicant and divided responsibility between petitioner, State Compensation Insurance Fund, and the County of Los Angeles, permissibly self-insured, on the basis of coverage, rather than stressful exposure.

It is a denial of due process of the United States Constitution to ignore the evidence and interpret Labor Code Section 5500.5 (d) as imposing an arbitrary duty to divide responsibility according to insurance coverage. This interpretion constitutes a conclusive presumption that can never be rebutted.

Furthermore, it is a denial of equal protection of the United States Constitution to devise a statutory scheme that provides for apportionment on the basis of stressful exposure in one employment situation and on coverage in another. There is no reasonable basis for this arbitrary, diametrically opposed application of apportionment.

QUESTIONS PRESENTED

I

Where a worker suffers an industrial injury the result of cumulative trauma, is it a denial of due process to divide responsibility for disability arbitrarily on the basis of insurance coverage and to ignore the evidence?

II

Is it a denial of equal protection to require some insurers to pay an award based on coverage while others do not?

STATEMENT OF FACTS

This petition is directed at the division of liability between the County of Los Angeles, legally uninsured, [hereinafter referred to as "County"] and the State Compensation Insurance Fund [hereinafter referred to as "petitioner"].

Petitioner raised the constitutionality of Labor Code Section 5500.5 (d) before the Workers' Compensation Appeals Board Judge at the hearing and at all stages of litigation.

The applicant, the widow of Joseph Busch, District Attorney for Los Angeles County, filed a death claim for workers' compensation benefits alleging that stress and strain of employment from February 5, 1952 through June 27, 1975 caused her husband's fatal heart attack. During this period workers' compensation insurance coverage was provided by petitioner until June 30, 1969, after which the County became legally uninsured. The division of coverage, therefore, was 74% for petitioner and 26% for the County.

The uncontradicted evidence established, however, that 80% of the disability was due to the stress that the deceased was exposed to during the time that the County was legally uninsured. Dr. Morton D. Kritzer, who was selected by the County, reported that 80% of the liability would be the responsibility of the County while 20% would be petitioner's.

Not only was Dr. Kritzer's unrefuted opinion the only one directed to the issue of apportionment, but it was amply supported by factual testimony of lay witnesses who knew the deceased as co-workers or friends and who saw him on a daily basis. Since there was no lay testimony to establish the proposition on which the Board relied—that the stress was uniform throughout the deceased's employment—in the interest of time all of the testimony on this point is not

restated here; however, the testimony of the wife and a co-worker who knew the deceased since high school demonstrate the weight of the evidence. The widow described the last "five to seven years" as a period of time when the stresses of the job became more noticeable. John E. Howard, who knew the deceased since high school and worked with him during the full time that Mr. Busch was in the District Attorney's office, stated that Mr. Busch was in excellent health at the time of his promotion to District Attorney in 1971 but that after his appointment he lost his vigor, became noticeably tired, and increasingly nervous. The overwhelming preponderance of evidence established that by far the most causative stress occurred *after* 1969 when the petitioner did not insure the County.

The Workers' Compensation Judge rendered his decision holding petitioner 74% responsible, rather than 20% as advised by Dr. Kritzer; similarly, he held the County 20% liable, rather than 80%. In spite of the fact that the Judge noted that the "medical opinions substantiate petitioner's contention," he viewed Labor Code Section 5500.5 (d) as requiring him to apportion liability on the basis of coverage. Despite his findings that the deceased's work was much more stressful after he became District Attorney, the judge ruled that he was bound to render his decision arbitrarily on the basis of coverage, not on the basis of his findings on the evidence. The constitutional issues were deferred to the Workers' Compensation Appeals Board.

The Board sustained the decision of the judge stating, "contribution shall not be determined, pur-

suant to the above-quoted statute [Labor Code Section 5500.5 (d)] on the basis of medical evidence concerning causation." The Board held that petitioner had not overcome the strong presumption of constitutionality and acknowledged the Legislature's absolute power to create what amounts to an irrebutable presumption. Further, the Board acknowledged that Labor Code Section 5500.5 (a), which also pertains to cumulative trauma injuries, provides for apportionment according to the evidence. The Board ruled that it was not a denial of equal protection to allow some carriers to obtain apportionment on the basis of stressful exposure while others could not.

Following the Board's denial of reconsideration, petitioner filed a petition for writ of review to the Court of Appeal, Second District, and following a denial by the Court of Appeal, filed a petition with the Supreme Court of California which was denied on December 15, 1977.

ARGUMENT

I

WHERE A WORKER SUFFERS AN INDUSTRIAL INJURY THE RESULT OF CUMULATIVE TRAUMA, IT IS A DENIAL OF DUE PROCESS TO DIVIDE RESPONSIBILITY FOR DISABILITY ARBITRARILY ON THE BASIS OF INSURANCE COVERAGE AND TO IGNORE THE EVIDENCE.

In assessing petitioner 74% of the award, the Board relied on that portion of Labor Code Section 5500.5 (d) which provides as follows:

> "The respective contributions of such insurers shall be in proportion to employment during their respective periods of coverage."

This arbitrary application is unconstitutional because it deprives petitioner of due process of law in two separate, distinct respects: First, the provisions of the section are in excess of the authority granted to the Legislature by the Constitution of California in that they impose upon petitioner liability for workers' compensation benefits in excess of the degree of responsibility demonstrated by the evidence; and second, the section deprives petitioner of an opportunity to defend against what is in fact a conclusive presumption of apportionment for liability.

The Appeals Board rejected petitioner's argument that Labor Code Section 5500.5 (d) permits apportionment. Petitioner called to the Board's attention the language in the section dealing with "the employment exposing the employee to the *hazards* of the claimed occupational disease," and urged the Board to adopt a construction that would permit apportionment. Petitioners reasoned that this interpretation allowed the Appeals Board to consider the degree of the exposure as well as whether a particular employment actually contributed to the disability. If an employment period was not hazardous it should be excluded from consideration; similarly if one period was more hazardous than another, liability should be predicated on the relative degree of severity. The Appeals Board rejected this interpretation on the grounds that they would be rewriting the statute. If this argument is

rejected, petitioners contend that the sectior. is unconstitutional per se.

The result obtained by the Judge and the Appeals Board clearly demonstrates the inequity that can result. In establishing a system of workers' compensation, the California Constitution, Article XX, §21, provides in part that the Legislature is vested with a plenary power to establish a complete system of workers' compensation and that "the administration of such legislation shall accomplish substantial justice in all cases." Petitioner contends that Labor Code Section 5500.5 (d) does not accomplish substantial justice in that an employer may be required to pay a greater proportionate share of his liability than is demonstrated by the actual facts of a particular case. To impose an award on an employer whose employment was substantially less stressful than other employment merely on the basis that uniform application is required under Labor Code Section 5500.5 (d) results in an absurd, arbitrary and unreasonable application of the section. This section exceeds the authority of Article XX, §21 of the California Constitution in that it does not accomplish substantial justice and violates the due process clause of the United States Constitution.

Legislation creating a presumption is invalid as a denial of due process if it operates in such a manner as to preclude a person against whom it is raised from presenting his defense to the main fact which is to be presumed. *Leary v. United States* (1969) 395 U.S. 6; *Tot v. United States* (1942) 319 U.S. 463; *Mobile, J.*

& K. C. R. Co. v. Turnipseed (1910) 219 U.S. 35, 42; *People v. Stevenson* (1962) 58 Cal.2d 794, 797; *Martin v. Superior Court* (1971) 17 Cal.App.3d 412, 415. In terms of money, this petitioner has been deprived of $24,495.00 without due process of law.

II

IT IS A DENIAL OF EQUAL PROTECTION TO REQUIRE SOME INSURERS TO PAY AN AWARD BASED ON COVERAGE WHILE OTHER INSURERS DO NOT.

In order to comprehend petitioner's argument, it is necessary to view Labor Code Section 5500.5 historically. When enacted in 1951, the section provided that *all* employment, regardless of the number of years involved, which caused or contributed to the worker's injury should be held responsible. Because cumulative trauma cases overburdened the Appeals Board and developed into a procedural nightmare, the Legislature enacted the 1973 amendments to simplify proceedings. These changes provided that where a worker was employed by more than one employer during the time that he was injured, only five years of employment would be considered, and all other employers would be relieved of responsibility. Most significantly for purposes of this brief, those employers included in the five year period were held accountable *according to the degree of stressful exposure,* not coverage. Utilizing the guidelines set forth in Labor Code Section 5500.5 (a), a worker could quickly institute an action and receive a prompt award. He need not join all of his former employers

and, in fact, could proceed against only one if he so chose. If he did elect against one employer, that employer had a right to proceed against other employers within the five-year period and seek apportionment by virtue of Section 5500.5 (e). Thus, the purpose of the amendments was to speed recovery for the worker and, at the same time, preserve the employer's right of apportionment. It is evident that the Legislature did not intend to divest the Appeals Board of the inherent right to make a judicial finding on apportionment or to deprive employers of the right of contribution. *Harrison v. Workers' Comp. App. Bd.* (1974) 44 Cal.App.3d 197, upheld the Legislature's right to exercise the police power of the state to relieve the congestion that existed in the Workers' Compensation Appeals Board. The court noted that in so doing the number of parties would be reduced.

The Legislature also provided under Labor Code Section 5500.5 (d) that in the case of a single employer the whole work history could be considered and the five-year cut-off date would not be applied. The obvious reason for the distinction is the likelihood that a multiplicity of parties, i.e., insurers, was lessened in the case of one employer. Petitioners contend that although the five-year period is not applicable where there is one employer, the Legislature did not intend to deprive the carriers of the right to a finding on apportionment and that such an interpretation is a denial of equal protection.

The crux of the Board's argument is that the Legislature distinguished between employers and in-

surers. Yet as petitioner pointed out, this distinction is irrelevant to the object of the legislation. Furthermore, Labor Code Section 3850 (b) provides that " 'Employer' includes insurer as defined in this division." The Board admitted that it is true "the positions of carriers and employers are sometimes equated to one another (it) is of no import in dealing with this issue." In fact the two are used so interchangeably in the Labor Code and decisions that they are synonymous.

The Board admitted that Labor Code Section 5500.5 (e) provides for apportionment but contended that this provision is not available to insurers. Yet in those situations where a single employer has been insured by a large number of different insurance carriers, is the worker required to join all of them before he can commence an action, or may he selectively proceed against one carrier? Injured workers who come under the ambit of 5500.5 (a) have the right to utilize this short cut. Since the Legislature did not intend to discriminate between injured workers, the obvious answer is that he may proceed against a single carrier and that carrier may seek apportionment under subsection (e). Since subsection (e) provides for apportionment, it is apparent that a carrier is entitled to a finding on this issue regardless of whether there is a multi-employment or single employment history. It is also clear that the distinction relied on by the Board is not relevant and that an insurer under 5500.5 (d) is entitled to a finding on the evidence.

The object of the 1973 amendments was to speed up litigation and simplify proceedings for the worker. The interpretation of Labor Code Section 5500.5 reached by the Board that denies some carriers apportionment and allows it to others is an unreasonable classification that is unrelated to the purpose of the act.

Where the classification is not a suspect one, the test is whether there is a rational basis for the distinction. The classification must bear some rational relation to a legitimate state purpose. *Weber v. Aetna Casualty & Surety Co.* (1972) 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed.2d 768; *Lindsey v. Normet* (1972) 405 U.S. 56, 92 S.Ct. 862, 31 L.Ed.2d 36. In the instant case, there is no justification for the claim that had the Board divided the liability according to the evidence, rather than coverage, the injured would have somehow not been able to litigate his claim as expeditiously. Furthermore, no extra time or work would have been expended by the Board since all that is involved is a mathematical computation, one that is based on the record.

In *Weber (supra)* the U.S. Supreme Court considered the relationship of legitimate and illegitimate children to their father and ruled that they were equal, that it was a denial of equal protection to treat one class different from the other. Petitioner asks the Court to consider whether one carrier should be treated different from another where both provide the same benefits to the same class. Regardless of the period of time considered, both insurers are en-

titled to a determination of apportionment based on the evidence. Finally, the principle of apportionment is one well recognized in California workers' compensation law which is devoted to the axiom that liability for benefits should be awarded according to the evidence. *Cypress Ins. Co. v. Workmen's Comp. App. Bd.* (1968) 266 Cal.2d 196.

For the foregoing reasons, it is submitted that this petition should be granted.

Dated, San Francisco, California,
January 25, 1978.

Respectfully submitted,
FRANK EVANS,
VONK, JAKOB, HERSHENSON & EVANS,
Attorneys for Petitioner,
State Compensation Insurance Fund.

(Appendices Follow)

APPENDICES

Appendix A

Workers' Compensation Appeals Board
State of California

Case No. 75 POM 41880

Jennie R. Busch (Widow),
Joseph P. Busch (Deceased),
Applicant,
vs.
County of Los Angeles, Legally uninsured and State Compensation Insurance Fund,
Defendants.

[Filed Feb. 8, 1977]

FINDINGS AND ORDER

The issues of contribution between defendants and the constitutionality of Labor Code Section 5500.5(d) having been submitted for decision, the Honorable E. E. O'Brien, Presiding Judge, now finds and orders as follows:

FINDINGS OF FACT

1. Joseph P. Busch died on June 27, 1975, as a proximate result of injury to his heart and cardiovascular system from February 5, 1952, through June 27, 1975, arising out of and occurring in the course of his employment as a Deputy District Attorney

and District Attorney at Los Angeles, California, by the County of Los Angeles, whose insurance carrier was State Compensation Insurance Fund to June 30, 1969, and legally uninsured thereafter.

2. The constitutionality of Labor Code Section 5500.5(d) is to be determined by a Court having jurisdiction to do so.

3. The liability of State Compensation Insurance Fund is in the amount of .7437% of all monies expended or to be expended pursuant to Findings and Award of November 4, 1976.

ORDER

It Is, Therefore, Ordered that State Compensation Insurance Fund pay the County of Los Angeles .7437% of all monies expended or to be expended pursuant to Findings and Award of November 4, 1976.

/s/ E. E. O'Brien
E. E. O'Brien
Presiding Workers'
Compensation Judge

Dated at Pomona, California
February 7, 1977
Served by mail on persons checked
on the official address record
February 7, 1977 / By L. B. Champion
L. B. Champion

Case No. 75 POM 41880

Jennie R. Busch (Widow)
Joseph P. Busch (Deceased)
vs.
County of Los Angeles, Legally uninsured and State Compensation Insurance Fund

Presiding Judge: E. E. O'Brien
Dated: Feb. 7, 1977
INJ: February 5, 1952 through June 27, 1975

OPINION ON DECISION

Constitutionality of Labor Code Section 5500.5(d)
As this Court is one of limited jurisdiction which does not extend to this issue, no further discussion is in order.

Contribution as between parties
Deceased was employed by defendant County of Los Angeles from February 5, 1952, through June 27, 1975. During this period the employer was insured by State Compensation Insurance Fund from February 5, 1952, through June 30, 1969 (a period of 17 years, 4 months and 22 days) and legally uninsured for the balance of 5 years, 11 months and 27 days.

Labor Code Section 55055.5 [sic] requires contribution based on time of exposure (rather than degree of stress) and it is thus found that defendant County of Los Angeles, Legally Uninsured, is entitled to

contribution from State Compensation Insurance Fund based on .7437 of all monies expended and to be expended, said percentage being based on said defendant's exposure of 6,347 days of the 8,534 days of employment.

/s/ E. E. O'Brien
E. E. O'Brien
Presiding Workers'
Compensation Judge

EEO:lbc

Appendix B

Workers' Compensation Appeals Board
State of California

Case No. 75 POM 41880

Jennie R. Busch (Widow), Joseph P. Busch (Deceased),
Applicant,
vs.
County of Los Angeles, Legally uninsured and State Compensation Insurance Fund,
Defendant.

[Filed March 25, 1977]

ORDER AND OPINION
DENYING RECONSIDERATION

Defendant, State Compensation Insurance Fund, seeks reconsideration of Findings and Order dated February 7, 1977, which ordered contribution among parties-defendant apportioned on the basis of exposure to liability pursuant to Labor Code Section 5500.5(d) instead of on the basis of causation. Petitioner contends that error resulted from a refusal to apportion defendants' respective contributions on the

basis of causation, because the sole medical opinion relegated greater causation to the latter part of the exposure period. It is further contended that subdivision (d) of Labor Code Section 5500.5 is unconstitutional, in that it deprives petitioner of due process of law and of equal protection of the law under the Constitutions of the United States and the State of California.

Enacted as Statutes of 1973, Chapter 1024, Section 4, the Subdivision provides as follows:

> "(d) If the employment exposing the employee to the hazards of the claimed occupational disease or cumulative injury was for more than five years with the same employer, or its predecessors in interest, the limitation of liability to the last five years of employment as set forth in subdivision (a) shall be inapplicable. Liability in such circumstances shall extend to all insurors who insure the workmen's compensation liability of such employer, during the entire period of the employee's exposure with such employer, or its predecessors in interest. *The respective contributions of such insurers shall be in proportion to employment during their respective periods of coverage.* As used in this subdivision, 'insurer' includes an employer who during any period of the employee's exposure was self-insured or legally uninsured." (Labor Code Section 5500.5(d) (emphasis added).

Thus, the statute speaks specifically in terms of contribution, which shall be determined on the basis of respective durations of coverage during the

employment period. Contribution shall not be determined, pursuant to the above-quoted statute, on the basis of medical evidence concerning causation. Petitioner argues also for a different construction of the word, "shall" than the one ordinarily applied by the courts. It is contended that use of the word, "shall" in the above subsection requires a directory rather than mandatory construction. It has previously been determined that, absent unusual circumstances, the word "shall" takes on a *compulsory* or *mandatory* significance. *Walker v. Los Angeles County* (1961) 55 Cal.2d 626; *Vogulkin v. State Board of Education,* 194 CA 2d 424. Under the facts of this case there appear no unusual circumstances for preferring a non-compulsory construction of the word. Unusual circumstances have been found where the word is found in a penal statute involving the rights of an accused. In that instance the construction most favorable to the offender is applied. *People v. Adams,* 99 Cal.Rptr. 122, 124. Since the instant statute is not a criminal one, those circumstances are not involved here. Furthermore, the Board can find no reason to apply a different construction of the statute's language that the one ordinarily preferred throughout the courts of this state when statutes like Section 5500.5 are considered. Accordingly, in providing for contribution by petitioner on the basis of its proportionate period of coverage, the compensation judge followed the mandate of the legislature expressed in the above referenced code provision. Consequently, the Board must uphold his determination.

Does Section 5500.5(d) violate the due process and equal protection clauses of the United States and California Constitutions? Before the subdivision will be declared invalid, as violating equal protection or due process clauses, petitioner must overcome a strong presumption of constitutionality. It has been held that,

> "Statutes must be upheld unless their unconstitutionality clearly, positively and unmistakably appears"
>
> *Subsequent Injuries Fund v. IAC* (1957) 48 Cal.2d 365, 22 CCC 100.

Furthermore, the burden of proof is on the petitioner which seeks to declare the statute unconstitutional. The Board does not believe that petitioner has met that burden.

Initially, petitioner failed to demonstrate precisely how it has been deprived equal protection. Petitioner apparently believes that the section, in the manner in which it is interpreted or applied, is unconstitutional. Petitioner also seeks to avail itself of provisions of subdivision (e) of Section 5500.5, which provides:

> "(e) At any time within one year after the appeals board has made an award for compensation benefits in connection with an occupational disease or cumulative injury, any employer held liable under such award may institute proceedings before the appeals board for the purpose of determining an apportionment of liability or right of contribution. Such a proceeding shall not diminish, restrict, or alter in any way the recovery previously allowed the employee or his dependents, but shall be limited to a determination of the respective contribution rights, interests or liabilities of all the employers joined in the proceeding, either initially or supplementally; provided, however, if the appeals board finds on supplemental proceedings for the purpose of determining an apportionment of liability or of a right of contribution that an employer previously held liable in fact has no liability, it may dismiss such employer and amend its original award in such manner as may be required."

Although not specifically included within the above-quoted provisions, petitioner seeks to find itself within the category of individuals sought to be protected, employers. It has opted for a two-step apportionment process. Initially, it would prefer apportionment of liability on the basis of causation under subdivision (d); thereafter petitioner would predicate contribution among employers (and carriers) upon the previously determined apportionment of causation.

Already noted by the Board is the fact that subdivision (e) makes no reference to "carriers" such as this petitioner. However, there are several additional problems with respect to the approach suggested by petitioner, in light of language of the statute, and in view of the facts of this case. Not the least of those problems is the fact that the approach recommended by petitioner would require the Board to rewrite the statute. This is plainly outside the purview of the Board's authority. Subdivision (d)

determines contribution on the basis of exposure and subdivision (e) makes no reference to "carriers"; the reference is to "employers". The fact that the positions of carriers and employers are sometimes equated to one another is of no import in dealing with this issue. Petitioner notes that subsection (d) speaks of both carriers and employers. From that it can be inferred that the legislature deliberately excluded reference to carriers in (e).

In order to demonstrate a denial of equal protection under more recent tests, the petitioner must show that it is placed in a suspect class or category, which has no rational basis or is the product of "invidious discrimination". *(Swoap v. Superior Court* (1973) 10 C.3d 490, 507. However, it has been stated that, "the Legislature may make a reasonable classification of persons and business and other activities, and pass special legislation applying to certain classes . . ." (Witkin, *Summary of California Law,* 8th ed, "Constitutional Law", Section 341, p. 3635). Of course, ". . . the classification must not be arbitrary, but must be based upon some difference in the class having a substantial relation to a legitimate object to be accomplished". (Supra) In the first place, petitioner has not demonstrated that it is the victim of a suspect classification. Secondly, even if it had, the purpose of the section under attack is to ameliorate a procedural morass, in order to expedite benefits to injured workers and insure smooth and efficient functioning of the workers' compensation system. Those objects are clearly proper concerns of the

Legislature in adopting the statute relating to petitioner. Accordingly, even if the petitioner could establish that it is the victim of a suspect classification, that classification was in furtherance of a legitimate object of legislative interest, and reasonably related to its accomplishment. *Swoap v. Superior Court* (supra) Nevertheless, the Board prefers to apply the traditional rule, which adopts the presumption in favor of statutory classification, which will be overturned only if *plainly arbitrary. Asbury Hospital v. Cass County* (1945) 326 U.S. 207, 66 S.Ct. Rptr. 61; *Mathews v. WCAB* (1972) 6 C.3d 719, 739.

In addition, petitioner refers to the unpublished opinion in *City of San Diego v. WCAB (Wiggens).* Actually, counsel for petitioner has cited the case by name, only, (without reference to page and volume numbers), as if it is authority for his contentions. However, we have noted that the *Wiggens* case is an unpublished opinion. Accordingly, it is not citable as authority for the proposition contained in this petition. (See Cal. Rules of Court, Rules 976, 977). Consequently, the Board is not persuaded by the due process contentions supported in counsel's reference to the *Wiggens* case.

Furthermore, as counsel for petitioner well knows, subsequent to *Wiggens,* the Court of Appeals denied a writ in the *House* case, in which this same petitioner raised substanially the same due process contentions raised in its current petition. *(SCIF v. WCAB (House)* (1976) 41 CCC 706) Accordingly, the Board is not persuaded by the contentions raised in its current petition.

For the foregoing reasons,

IT IS ORDERED that defendant's petition for Reconsideration filed herein on February 25, 1977 be, and it is hereby, DENIED.

(Seal) WORKERS' COMPENSATION APPEALS BOARD

/s/ Florence T. Pickard

I CONCUR.
Gordon Gaines,
Hale Ashcraft.

Dated and filed in San Francisco, California, March 25, 1977.

Service by mail on said date to all parties listed on the official address record.

Ruben Marquez.

Appendix C

In the Court of Appeal
State of California
Second Appellate District

DIVISION FOUR

2d Civ. No. 50992
(W.C.A.B. No. POM 41880)

State Compensation Insurance Fund,
Petitioner,

vs.

Workers' Compensation Appeals Board of the State of California; County of Los Angeles, legally uninsured, and Jennie R. Busch,
Respondents.

[Filed Nov. 15, 1977]

ORDER

THE COURT:

The petition for a writ of review filed herein is denied.

Appendix D

Clerk's Office Supreme Court
4250 State Building
San Francisco, California 94102

December 15, 1977

I have this day filed Order

HEARING DENIED

In re: 2 Civ. No. 50992
State Compensation Ins. Fund

vs.

WCAB

Respectfully,
G. E. Bishel
Clerk

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977
No. 77-1121

STATE COMPENSATION INSURANCE FUND,

Petitioner,

vs.

WORKERS' COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA; COUNTY OF LOS ANGELES, legally uninsured; and JENNIE R. BUSCH,

Respondents.

On a Petition for a Writ of Certiorari
Directed to the Court of Appeals
for the Ninth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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Attorneys for Respondent
County of Los Angeles,
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977
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STATE COMPENSATION INSURANCE FUND,

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WORKERS' COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA; COUNTY OF LOS ANGELES, legally uninsured; and JENNIE R. BUSCH,

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BOARD OF THE STATE OF CALIFORNIA;
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and JENNIE R. BUSCH,

Respondents.

BRIEF OF RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

1. Where a worker suffers industrial injury as a result of cumulative trauma caused by stress and strain, and some of this stress and strain is shown by the evidence to have occurred during Petitioner's insurance coverage of the defendant employer, is it

a denial of due process to require contribution for the resultant award on the basis of Petitioner's time share of the employment?

2. Does Section 5500.5 of the Labor Code of the State of California deny equal protection to Petitioner?

STATEMENT

This litigation concerns the proper contribution to a death benefit award in a workers' compensation case to be assessed against the two co-defendants, Petitioner State Compensation Insurance Fund and Respondent County of Los Angeles, legally uninsured.

The late District Attorney of Los Angeles County, Joseph P. Busch, began employment in the District Attorney's office on February 5, 1952 and remained in that employment until he died on June 27, 1975, from coronary arteriosclerosis. Coverage for workers' compensation insurance was by Petitioner State Fund up through June 30, 1969, or 74.37% of Mr. Busch's employment. During the remaining 25.63%, Respondent County of Los Angeles was legally uninsured.

Evidence submitted at the initial trial of this matter showed that Mr. Busch began as a Deputy District Attorney Grade I and progressed through the ranks until he became District Attorney. Evidence was unrebutted that he was under some stress and strain throughout the entire duration of his employment. It also showed that as he

advanced in rank the responsibilities and pressures on him increased correspondingly, being heaviest in his last position.

The medical evidence, specifically the report of Dr. Morton D. Kritzer of September 24, 1976, before the Workers' Compensation Appeals Board of the State of California was as follows, on the issue of stress during employment:

1. Mr. Busch "had been in a stressful situation for a lifetime or at least a lifetime that he worked" (in the District Attorney's office);

2. The relative weight of the stress was quantified by Dr. Kritzer as greater in the last few years: "approximately 80% was due to the time from 1969 on. 20% prior to 1969."

3. This quantification did not appear certain to the doctor. "It is difficult for me to evaluate exactly how much this patient was aggravated . . . and between what periods of time . . . . I trust that this answers your questions in what is now somewhat of a mystery to me."

(All quotations from Dr. Kritzer's report of September 24, 1976.)

Based on this evidence, and following California Labor Code §5500.5(d), an award of the death benefit in favor of the widow was made against Petitioner and Respondent in proportion to their respective shares of the coverage: Petitioner 74.37% and Respondent 25.63%.

ARGUMENT

I

INTRODUCTION

It is important to note that Petitioner's argument is in substance that it has been aggrieved by the selection of one way of measuring contribution: namely, the length of time during which the injury occurred, rather than by the estimate of the approximate weight of the stress during the later time period of the injury. Evidence in the case could support both methods. The California Legislature chose contribution by time length when it passed §5500.5(d) of the Labor Code. When Petitioner complains that the shares of liability were assessed "arbitrarily" and by "ignoring the evidence," what is referred to is the refusal of the Appeals Board and the appellate courts to select Petitioner's preferred method of measuring, rather than the Legislature's.

It should also be noted that Petitioner, on Page 9 of the Petition, misstates the Appeals Board's basis for decision. The Board did not rely on the proposition "that the stress was uniform throughout the deceased's employment." As long as there was stress during Petitioner's coverage period, §5500.5(d) compelled contribution on that basis, without reference to estimates of stress "weight" or uniformity.

Nor is Petitioner correct when on page 10 it asserts "the judge ruled he was bound to render his decision arbitrarily on the basis of coverage," that loaded adverb being Petitioner's own characterization. The Workers' Compensation Judge stated, correctly, in the Opinion on Decision, that the Labor Code Section involved "requires coverage based on time of exposure (rather than degree of stress)."

Lastly, Respondent would point out that Petitioner's claim on page 11 that the Appeals Board acknowledged that §5500.5(a) provides for apportionment according to the evidence is not justified by any language in the Board's Order and Opinion Denying Reconsideration. There is therein no reference in the Board's discussion to subsection (a). There is no statement as to any method of determining contribution for those parties not coming under subsection (d). The Board said, indeed, that "petitioner failed to demonstrate precisely how it has been deprived equal protection" (sic). Petitioner now seeks to remedy that lack by asserting an "acknowledgement" and a "ruling" by the Board that other carriers could "obtain apportionment on the basis of stressful exposure" (implying by this, on the basis of "weight" of stress), when the Board made no such acknowledgement or ruling.

In making its argument to the Supreme Court of the United States, Petitioner emphasized the supposed arbitrariness of the decision and the supposed fact that it ignored all the evidence, by failing to disclose the evidence supporting the length of exposure, and by giving the evidence on weight a certainty that the medical expert himself did not possess, leaving out the hesitancy and doubts

expressed in his report.

II

PETITIONER HAS NOT RAISED ANY SUBSTANTIAL FEDERAL QUESTION

Since, as set forth in Rule 19 of the Rules of the Supreme Court, a review on writ of certiorari is not a matter of right but of scound judicial discretion, Petitioner must show some special and important reasons why it should be granted; why it is vital that the question be decided by the Supreme Court. A mere allegation of less than perfect fairness in the decision appealed is insufficient.

But this Petition does not set forth the consequences of the decisions for other litigants, or claim any conflict with other U.S. Supreme Court decisions, or Federal or California Appellate decisions.

Nor are there "a considerable number of suits . . . pending in the lower courts which will turn on resolution of these issues" (Massachusetts Trustees v. United States (1964) 84 S.Ct. 1236, 1239, 377 U.S. 235, 251). Indeed, in the less than five years since subsection (d) became effective on January 1, 1974, only four cases on the issue of computing "length" of stress versus "weight" of stress were reported in the California Compensation Cases; two involved this

Petitioner and this Respondent, and one of those was this case. (See Cal. Comp. Cases Vols. 39 through 42 and advance sheets for Vol. 43, covering the years 1974 through 1977 in bound volumes. This service reports all California workers' compensation cases of general interest and the great majority reported are those which the Courts of Appeal refuse to review.)

Nor will there be many future cases; the subsection was repealed effective January 1, 1978. Thus the case is one "not apt to have continuing future consequences as where a statute . . . has been repealed. . . ." (Mr. Justice Harlan, "Some Aspects of the Judicial Process in the Supreme Court of the United States," 33 Australian L. J. 108 at 112 (1959)), and therefore it is inappropriate for Supreme Court review. The resolution of this case is not likely to have any immediate consequences beyond the particular facts and parties involved.

The legal point involved is a comparatively trivial one. The legislature's choice of a "length of time exposed" measure of damages rather than a "relative weight of time exposed" is not one of tremendous national importance.

(Cf. Mr. Justice Marshall discussing a somewhat similar point - legislative attempts to solve the contribution problem in maritime cases - in Cooper Stevedoring Co., Inc. v. Fritz Kopke, Inc. (1944) 94 S. Ct. 2174 at 2178, 417 U. S. 106, 112: "Confronted with the possibility that any workable rule of contribution might be inconsistent with the balance struck by Congress in the Harbor

Workers' Act between the interests of carriers, employers, employees, and their respective insurers, we refrained from allowing contribution in the circumstances of that case.") (Referring to Halcyon Lines v. Haenn Ship Ceiling and Refitting Corp. (1952) 342 U. S. 282, 72 S. Ct. 277, 96 L. Ed. 318.)

The California legislature performed just such a balancing act among the competing interests of carriers, employers, injured employees and the Appeals Board in §5500.5, as amended effective January 1, 1974, a fact bitterly complained of by Petitioner in its Petitions to the California Appellate Courts.

There being no reasons of overriding national importance to disturb the effects of this now repealed statute, certiorari should not be granted.

III

PETITIONER'S DUE PROCESS ARGUMENT

The claim in the Petition that §5500.5(d) set up a "presumption" is incorrect, nor was Petitioner precluded from presenting its defense to the "main fact which is to be presumed" (unstated, but apparently the proper share of the award). Evidence could have been submitted rebutting the claimed period of coverage, the claimed period of employment, or the claimed exposure to the hazards of stress during some

or all of Petitioner's coverage. All that was precluded was the substitution of one way of measuring stress for another.

Petitioner cites only cases relating to the validity of presumptions. These lack relevance to Petitioner's real argument. Indeed, one of the cases cited states:

> "But this Court has never so construed the limitation imposed by the Fourteenth Amendment upon the power of the State to legislate with reference to particular employments as to render ineffectual a general classification resting upon obvious principles of public policy because it may happen that the classification includes persons not subject to a uniform degree of danger."
>
> Mobile, J. & K. C. R. R. v. Turnipseed (1910) 219 U.S. 35, 40, 31 S. Ct. 136, 137.

It is precisely Petitioner's argument in the instant case that because the decedent was not subject to "a uniform degree of danger" throughout his employment, the Fourteenth Amendment is violated by a classification based on the period of insured employment.

IV

PETITIONER'S EQUAL PROTECTION ARGUMENT

This argument required lengthy discussion of subsections (d) and (e) of §5500.5 but, as the Appeals Board remarked below, nowhere shows how Petitioner has been deprived of equal protection.

A bare claim to that effect is insufficient; it must be shown (not merely asserted) that a comparable or similar group has been given more favorable treatment. Ellis v. Dixon (1954) 349 U.S. 458, 460-462.

(Note that the following cases, all decided before §5500.5(d) was enacted, recommended that the liability of co-defendants be based on their time share of a continuing trauma: State Compensation Insurance Fund v. Industrial Accident Commission (1954) 125 Cal.App.2d 201, 204, 270 P.2d 55, 57; 19 Cal. Comp. Cases 98, 100; Royal Globe Insurance Co. v. Industrial Accident Commission (1965) 63 Cal.2d 60, 403 P.2d 129, 30 Cal. Comp. Cases 199, and cf. the Writ Denied case of Zenith National Ins. Co. v. W.C.A.B. (1966) 31 Cal. Comp. Cases 295. See also Charles Swezey, in "Repetitive Trauma as Industrial Injury in California" 21 Hastings L. J. 631 at 643 (Feb. 1970) which recommends this method of contribution.)

There have been no cases in California holding that there must be a difference in computing

contribution between carriers who come under subsection (d) and those who come under subsection (e) since these became effective. Now that they are repealed, it is unlikely that there will ever be any.

V

CONCLUSION

There being no substantial question of great public importance presented by this case, and no violation of Petitioner's due process or equal protection rights under the Fourteenth Amendment to the Constitution of the United States, this Petition for Writ of Certiorari should be denied.

DATED: March 15, 1978

Respectfully submitted,

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Attorneys for Respondent
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legally uninsured